BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES D. HALL Claimant	)	
VS.	)	
MARTIN LOGAN, LTD Respondent	)	Docket No. 1,021,353
AND	)	
EVEREST NATIONAL INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 30, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on November 5, 2008. John J. Bryan, of Topeka, Kansas, appeared for claimant. Jeff S. Bloskey and Kimberlee K. Conard, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an occupational disease which arose out of and occurred in the course of his employment with respondent.[1] The ALJ found claimant's date of disablement to be November 8, 2004, and claimant's average weekly wage to be $930.19 on November 8, 2004, and $982.94 on June 9, 2005. The ALJ used K.S.A. 44-510e(a) to compute claimant's award. He adopted the assessment of Dr. H. William Barkman and found that claimant had a 7.5 percent functional disability. He used the task loss opinions of Dr. Koprivica and found that claimant had a 93.5 percent task loss. He further found that from May 13, 2005, until August 13, 2007, claimant had a 100 percent wage loss. This computed to a 96.75 percent work disability during that period. After August 13, 2007, claimant was making a

[1] The ALJ's Award also "finds claimant suffered personal injury by accident which arose out of and occurred in the course of his employment with the respondent." ALJ Award at 4 (June 30, 2008).

wage comparable to his preinjury average weekly wage and, therefore, was no longer entitled to a permanent partial disability award based upon work disability.

The Board has considered the record and adopted the stipulations listed in the Award. Further, the Board has considered the transcript of the preliminary hearing held November 3, 2005, and the exhibits; the transcript of the preliminary hearing held March 2, 2006, and the exhibits, and the transcript of the motion hearing held December 21, 2006.

ISSUES

Respondent requests review of the ALJ's findings and conclusions as to whether claimant suffered an accident or occupational disease arising out of and in the course of his employment with respondent; whether claimant's failure to use appropriate safety guards bars his right to recovery of workers compensation benefits; the date of accident or disablement; claimant's average weekly wage; whether claimant is entitled to an award of permanent partial disability; whether claimant is entitled to an award of work disability; and whether the ALJ properly computed benefits owed to claimant, including whether benefits should be apportioned between claimant's alleged exposure to fumes and the aggravation of his condition by an ordinary disease of life.

Claimant contends he suffered either an accident or occupational disease that arose out of and in the course of his employment with respondent and that he is entitled to an award of permanent partial disability compensation and an award of work disability. Claimant further argues that respondent is estopped from raising an affirmative defense of failure to use a safety guard as the issue was not raised at either the prehearing settlement conference or the regular hearing. In the event the Board allows respondent to raise this defense, claimant contends his failure to use the safety guards was not a willful refusal to obey a rigid policy. Claimant also asserts that the ALJ's finding that November 8, 2004, is the date of accident or disablement is supported by substantial competent evidence. Claimant requests that the ALJ's finding that there should be no apportionment of the disability be affirmed. Claimant requests that the Award be modified to find that his average weekly wage was $1,076.76. Claimant also contends the ALJ's final award was miscalculated and that he is entitled to a total award of $64,649.27.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident or an occupational disease arising out of and in the course of his employment with respondent?

(2) Did respondent timely raise the defense of nonuse of safety guards? If so, did claimant fail to use appropriate safety guards such that his right to recover workers compensation benefits should be barred?

(3) What was claimant's date of accident or disablement?

(4) What was claimant's average weekly wage?

(5) What is the nature and extent of claimant's disability? Is he entitled to a work disability due to his alleged accidental injury or occupational disease?

(6) Should claimant's disability be apportioned between claimant's work and non-work related conditions?

(7) Did the ALJ miscalculate the amount of workers compensation benefits due to claimant?

FINDINGS OF FACT

Claimant began working for respondent in October 1987, and his last day worked was May 13, 2005. Most of time he worked for respondent, he did painting and sanding, and later supervised painters. All the painting was done by spraying versus using a brush. While working for respondent, he was exposed to urethane fumes, odors or gases. He was also exposed to chemicals and dust. Claimant described the area in which he painted as consisting of two spray booths and a sanding area. He said the fumes would be everywhere. He was provided with a respirator to use, but there was no requirement that he use it. He wore a respirator some of the time, but he was unable to talk while wearing the respirator. During the later years of his employment, he was a supervisor, and part of his job was to talk to and teach other employees. He agreed that using a respirator in his work environment was a reasonable safety precaution and said it was his decision whether to use a respirator.

Dr. Rodney Bishop has been claimant's family doctor for 18 years. Dr. Bishop wrote a letter dated November 8, 2004, in which he indicated that claimant suffered respiratory symptoms and disease as a result of painting and that it would not be appropriate for him for return to work as a painter. The letter did not recommend medical treatment. Claimant provided the letter to respondent, and eventually he was moved across the street to another area where he was not as exposed to the fumes, although there was still sanding and painting going on there. He was given new job duties of writing procedure manuals. His pay was cut by $1 per hour.

May 13, 2005, was claimant's last day of working at respondent. He had surgery on his shoulder the next day for a work injury not related to this claim. He did not return to work after his surgery but, instead, signed a severance agreement on August 10, 2005, ending his employment with respondent. The last paycheck he received from respondent was on June 9, 2005, and he believes his fringe benefits also stopped on that date.

The parties stipulated that claimant made a base weekly wage of $788 per week ($17.90 per hour x 40 hours). Respondent submitted a wage statement as an exhibit at the regular hearing. Using a date of accident of November 8, 2004, respondent urges the

Board to find that claimant earned an average of $47.39 in overtime during the 26-week period before November 8, 2004. Respondent, however, computed claimant's overtime wages at the rate of $9.85 per hour rather than $29.55 per hour. Claimant added all monies paid over the amount of $788 to come up with an average overtime of $156.41. The ALJ added the number of hours overtime worked by claimant during the pertinent 26-week period, multiplied the number of hours by $29.55, and divided by 26, thereby computing that claimant earned an average of $142.19 per week in overtime.

In computing fringe benefits, using a date of accident of November 8, 2004, respondent contends claimant earned fringe benefits in the total amount of $52.74 per week. Claimant is claiming fringe benefits in the amount of $134.10 or $132.35 per week, depending on how the Board decides to compute respondent's contribution to claimant's 401(k). It appears the figures claimant is using for a weekly deduction are from a pay statement, Respondent's Exhibit A to the regular hearing. However, the pay statement covers a two-week period. The ALJ found that respondent spent $2,742.94 for fringe benefits for claimant in 2004. Dividing that figure by 52, he found that claimant's fringe benefits averaged $52.75 per week.

Claimant had no type of breathing or pulmonary problems before starting work for respondent. He had not seen a doctor for bronchial spasms, asthma, or other pulmonary problems. Claimant started developing symptoms of his current problems in about 1990 or 1991. It started as a clearing of his throat and worsened to the point where he had a full-blown cough. In 1994, Dr. Bishop noticed that claimant was coughing and clearing his throat and sent him for a bronchoscopy and lung biopsy. Between 1994, when he was first treated for his condition, and 2005, his coughing became worse and more prevalent.

In 2003 to 2004, Dr. Bishop treated claimant for symptoms of GERD, although his diagnosis was gastritis, not GERD. He was given Nexium and Prevacid. Claimant said he did not use the medication long, and his symptoms went away. Pharmacy records show he filled two prescriptions for Prevacid in February and March 2004. Although he was prescribed Nexium, he did not fill a prescription for that medication and said he probably received samples from Dr. Bishop. He has not been treated for any symptoms of GERD since 2004. Claimant denied that he had GERD and said he had gastrointestinal problems in 2003 and 2004 and was put on Prevacid. He testified that Dr. Bishop did not tell him he had GERD.

After resigning his position with respondent, claimant contacted a temporary agency and told them how much he would like to earn, but they did not find him any work. He inquired about working for Home Depot but was not satisfied with the wage they were offering. He also inquired about a job with Payless. He went to the unemployment office, but there was no job opening making a comparable wage. He was seen by a vocational counselor with the Kansas Department of Social and Rehabilitation Services (SRS) Division of Vocational Rehabilitation and had vocational testing. The testing pinpointed a career as a respiratory therapist, and he started school at Washburn University for that in

August 2005. He finished school in May 2007 with an associates degree, and he is now a licensed respiratory therapist. During the time he was in school, he was a full time student. He went to school year round. He testified he was not able to work in addition to going to school because of the time spent in classes, studying and clinicals. He took out school loans because he did not have time to work. The instructors at school discouraged him from getting a job. He agreed that he made the decision to go to school rather than find a job. He was physically capable of performing a job but could not find one that would allow him to make a wage comparable to what he was making at respondent.

After he graduated from Washburn University, he was required to pass a test to get a license. On August 13, 2007, he started working for Children's Mercy Hospital as a respiratory therapist earning $18.07 per hour, with extra compensation when he worked nights or weekends. He now works for Sleep Care, where he earns $24 per hour.

Dr. Thomas Beller, who is board certified in internal medicine with a subspecialty certification in pulmonary medicine, examined claimant on August 3, 2006, at the request of respondent. As part of the evaluation, he reviewed some of claimant's medical records and performed a physical examination. He also had chest x-rays taken and performed pulmonary function tests. The x-rays and pulmonary function test results were normal. Claimant had previously had pulmonary functions tests done at Kansas University Medical Center (KUMC), including a methacholine challenge test, which measures airways' responsiveness or reactivity. The results of that test and the other pulmonary testing done at KUMC were normal.

Claimant gave Dr. Beller a history of having a cough for 10 years. The cough initially developed as throat clearing but developed into a cough. The cough was not productive and he did not cough up blood. He improved with medication and was asymptomatic when seen by Dr. Beller. Dr. Beller diagnosed claimant with chronic persistent cough secondary to chronic bronchitis, which he said was either a naturally occurring process aggravated by work exposure or was caused by work exposure. He stated that claimant may also have an element of airway reactivity or bronchospasm, but that was a minor component of his presentation.

Dr. Beller said that exposure to some chemicals could cause bronchitis, depending on how long the exposure was and whether the person was wearing any kind of respiratory protection. He also said that chronic bronchitis could also be an ordinary disease of life, because it is a condition to which the general public is exposed without being exposed to any particular workplace environment. If claimant's chronic bronchitis was a naturally occurring condition that had been aggravated, Dr. Beller did not think there was a way to tell what percentage was due to the underlying chronic bronchitis and what was due to the aggravation.

Dr. Beller said that gastroesophageal reflux disease (GERD) is an ordinary disease of life and is a condition to which the general public is exposed exclusive of workplace

exposure. Based on a review of claimant's medical records, Dr. Beller believed that claimant did have GERD that had been aggravated by his chronic bronchitis. Dr. Beller opined that acid reflux accounted for about 25 percent of claimant's problems, with the other 75 percent caused by other factors. However, he also stated that if a person had no treatment for GERD, then was treated for two months, and did not have treatment again, he would not think that GERD was a major problem for that person. If someone had GERD sufficiently severe to scar bronchial tubes, he would expect it to be severe enough that the patient would seek help, although some patients have silent reflux and may not be aware of reflux.

Dr. Beller's only restriction was that claimant have a job where he did not have a lot of exposure to fumes, dust, smoke or respiratory irritants. He believes that claimant is physically capable of performing any type of work, as long as there is not exposure to those irritants. Claimant's lung function was normal and he was essentially asymptomatic.

Using the AMA *Guides*,[2] Dr. Beller opined that claimant had a 5 to 10 percent permanent partial impairment to the whole body.

Dr. Beller anticipated that claimant would need periodic medical follow-up. He did not think claimant would need medication indefinitely, and he might be able to get by with less medication than he was on at the time he was examined. He said that claimant's predominant problem seemed to be chronic bronchitis as opposed to airway reactivity, and he was not sure claimant needed all of the bronchodilator medications he was on.

Dr. P. Brent Koprivica, who is board certified in emergency medicine and preventative and occupational medicine, examined claimant on December 2, 2006, at the request of claimant's attorney. At that time, claimant was symptomatic. His symptoms were throat clearing and a cough. Claimant did not exhibit or complain of any other symptoms. Dr. Koprivica opined that claimant had pulmonary impairment from problems with chronic bronchitis and hyperreactive airways disease. He believed that fumes, isocyanates, and dust, or a combination, at work contributed to claimant's pulmonary impairment, along with other factors. Dr. Koprivica believed claimant had an occupational disease. The spraying process exposed claimant to fumes. And those chemicals resulted in his pulmonary impairment or contributed to his pulmonary impairment. This was exposure over time to substances.

Dr. Koprivica said claimant had no condition before his employment at respondent that was known by him or his doctors that would be considered a pulmonary disability or dysfunction or susceptibility to reactive airways disease or chronic bronchitis. Claimant is a nonsmoker, so the impairment in his lungs is not related to smoking. In Dr. Koprivica's

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

opinion, claimant has an obstructive component. Claimant has normal pulmonary function studies away from exposure while being medicated, so he believes claimant has a very mild impairment. If claimant is put in a dusty environment or is exposed to fumes, he will have obstructive changes.

Dr. Koprivica opined that claimant was at maximum medical improvement as of the time he saw Dr. Beller in August 2006. The only restriction Dr. Koprivica would place on claimant would be to avoid fumes, dust or other respiratory irritants permanently. He said that physically claimant could return to work as long as he avoided pulmonary exposure.

Dr. Koprivica believed that claimant sustained a permanent aggravation to chronic bronchitis as a consequence of the irritant effect from the exposures. Dr. Koprivica did not know what caused claimant's bronchitis, but the fumes and dust he was exposed to at work aggravated it. Chronic bronchitis is a condition to which the general public is exposed outside of any employment involving exposure to dust or fumes. It was Dr. Koprivica's opinion that claimant's exposure to dust and fumes permanently aggravated his chronic bronchitis.

> Q. [by respondent's attorney] In order to have an aggravation from fumes, we have to have a bronchitis already existing, correct?
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> A. [by Dr. Koprivica] If it is purely aggravation, yes, that's correct. . . . In my direct I had said that I thought there was a contribution of the nature of some of the exposures as well, which is a separate issue. But I also feel like there is aggravation that has occurred as well to underlying nonwork-related contributors such as gastroesophageal reflux.[3]

GERD is an ordinary disease of life. It is a condition to which the general public is exposed outside of any employment where they might be exposed to dust or fumes. It was Dr. Koprivica's belief that claimant's condition of hyperreactive airways disease and chronic bronchitis is multifactorial and that GERD was a contributor. He could not give an opinion on what proportion the GERD contributed to claimant's condition. Dr. Koprivica also said that if GERD was a significant component of claimant's problem, he should be taking medication to prevent it.

Dr. Koprivica opined that had claimant never had the occupational exposure, it is unlikely he would have the condition he has today. Claimant now has a permanent, irreversible change that is related to his work. That is the reason Dr. Koprivica believes he has a permanent impairment. "I don't want it to be misunderstood that there hasn't been a permanent injury."[4]

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[3] Koprivica Depo. at 22-23.

[4] Koprivica Depo. at 49.

When rating claimant's impairment, Dr. Koprivica referred to page 2 of the AMA *Guides*. He said the AMA *Guides* say that the percentage of impairment is meant to reflect the impact on claimant's ability to do activities of daily living. Claimant was impaired. He has to avoid exposure to fumes, dust, and respiratory irritants as a result of his occupational exposure. He had to leave his work. Although his pulmonary function studies were normal, he did have a mild impairment. The *Guides* give a range of 10 to 25 percent. Because claimant would need to avoid exposure, he placed claimant in the low end of Class II, which was 10 percent. However, Dr. Koprivica agreed that based on the AMA *Guides,* pg. 162, considering claimant's pulmonary function test results, claimant would fall into Class I, zero or no impairment. When the *Guides* don't have a specific provision for a specific condition, he is supposed to use his judgment as a physician if the patient actually has an impairment.

Dr. Koprivica reviewed the task list prepared by Bud Langston. He opined that claimant would not be able to perform any of the tasks because of the exposure to dust or irritants, for a 100 percent task loss. Dr. Koprivica also reviewed the task list of Mike Dreiling. Of the 8 tasks on that list, Dr. Koprivica opined that claimant was unable to perform 7 for a task loss of 88 percent. As of the date claimant was seen by Dr. Koprivica, he was physically capable of earning an income in any trade or employment where he was not exposed to fumes and dust.

He believes claimant would need medication routinely on a daily basis, not just when he has an acute attack.

Dr. H. William Barkman performed an independent medical examination of claimant on February 1, 2008, at the request of the ALJ. He took a history from claimant and reviewed the medical records. He stated that claimant had a persistent cough since the early 1990's. He believed the causes were multifactorial, and triggers were GERD, cigarette smoke, changes in temperature, and exposure to fumes at work. Claimant underwent an open lung biopsy in 1994 that was nondiagnostic, but his lung abnormalities and symptoms were felt to be work related. Dr. Barkman could not establish a specific causal relationship to work alone but found that it was clear that claimant's symptoms were aggravated by work.

Dr. Barkman found that claimant was at MMI but would require routine follow-up and treatment for his cough. He opined that claimant had a 5 to 10 percent impairment to the whole body. He said that claimant should have no further exposure to lacquer or isocyanate paint compounds.

Bud Langston, a vocational rehabilitation consultant, met with claimant on September 29, 2006, at the request of claimant's attorney. Together they prepared a list of 12 tasks claimant had performed in the 15 years before his occupational disease.

Mr. Langston stated that in looking at claimant's education and previous work history, he had skills, but those skills were not transferable to other jobs when taking into consideration his respiratory problems and restrictions. His primary skill would have been as a painter and woodworking. He had a high school education. Claimant worked about 10 years before starting with respondent. During that period of time, he worked in construction and in the oil fields. Both jobs would have exposed him to dust, wind and extreme temperatures. If he had done carpentry work inside, he would have been exposed to sawdust. Given claimant's medical history, Mr. Langston would not recommend that claimant return to work in construction or in the oil fields.

Mr. Langston believed that claimant made a good faith effort to return to work at a comparable wage. He believes claimant would not have been able to return to work at a comparable wage without returning to school.

Mr. Langston agreed that other than a respiratory condition, claimant was physically capable of performing any job for which he was qualified. He had the physical ability to perform any type of labor in the market. The respiratory problem was the factor that removed him from the labor market. After claimant left respondent, he was physically capable, other than avoiding exposure to irritants, of performing any job for which he was qualified, and this would have been true while he was in school.

Mr. Langston felt claimant was physically capable of earning between $8 and $10 per hour. He thought he could earn that wage working in sales, possibly sales of building supplies where he would not be in a lumberyard or any place that might have dust. He did not review any specific job vacancies, nor did he review any materials on the Kansas job link internet site.

Mr. Langston did not think claimant would have been successful in school if he had also worked full time because of the disadvantage he had in returning to school after 25 years in the workforce.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant on February 20, 2007, at the request of respondent. He prepared a list of 8 tasks that claimant performed in the 15 years before his occupational disease.

Mr. Dreiling opined that if claimant were actively pursuing work in the labor market, he would have been able to be employed and would have been able to physically work either part time or full time.

Mr. Dreiling opined that, taking into account claimant's work background, medical difficulties, and the labor market information, claimant could have expected to have earned $12 per hour. Claimant did not indicate to Mr. Dreiling that he made any attempt to perform seasonal jobs while not in school between semesters. Mr. Dreiling believed that working weekends would have been an option for claimant while in school.

Mr. Dreiling agreed with the recommendation of SRS's Division of Vocational Rehabilitation Services that claimant take a course of respiratory therapy training. When looking at claimant's medical restrictions, he said that would be a clean work environment for him.

If claimant had gone out and found a job earning $8 per hour, Mr. Dreiling would not consider that to be a good faith effort to find a job earning a comparable wage, unless he had been searching for months and finally got a job in a tough environment. To attain a comparable wage within five or six years, claimant would have had to get additional skills. As a vocational counselor, he would encourage people to get new skills and maximize their earning potential. He personally thinks that claimant made the right decision by becoming a respiratory therapist. He was trying to improve his educational level and skill level to prepare for reentry into the labor market. Going to school is a full-time job in an of itself when starting the clinical part of it. He believes that claimant made a good faith effort to get back to work in the labor market at a job that represented a comparable rate of pay. Another option would have been aggressively looking for a job with a comparable wage. Mr. Dreiling did not find a job with a comparable wage that claimant could have gotten.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-5a01(b) states in part:

> "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases.

K.S.A. 44-5a01(d) states:

> Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.

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[7] *Id.* at 278.

K.S.A. 44-5a06 states in part:

> The date when an employee or workman becomes incapacitated by an occupational disease from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, shall be taken as the date of the injury equivalent to the date of accident under the workmen's compensation act. Where compensation is payable for an occupational disease, the employer in whose employment the employee or workman was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer, shall be liable therefor, without the right to contribution from any prior employer or insurance carrier; the amount of the compensation shall be based upon the average wages of the employee or workman when last so exposed under such employer, and the notice of disability and claim for compensation, as hereinafter required, shall be given and made to such employer.

In *Berry*,[8] the Kansas Court of Appeals stated:

> The fact is, carpal tunnel syndrome appears to be a hybrid condition that is neither fish nor fowl. It is a condition caused by repetitive trauma over a long period of time. While it is true that it is caused by trauma and thereby fits the definition of an "injury caused by accident," it is nonetheless a condition that defies any attempt to affix the precise date the accident occurred. For example, in this case, claimant's bilateral carpal tunnel syndrome was not diagnosed until several months after he left his job. If we were to adopt the date of "diagnosis" analysis, we would be awarding compensation to begin at a time several months after claimant left his employment. This does not seem to be a logical result. Despite that fact, if claimant's condition was caused by or related to his job with respondent, claimant is entitled to be compensated for the condition even though it neither was "diagnosed" nor "manifested itself" until several months after he left his job. We conclude that where the evidence indicates that the bilateral carpal tunnel syndrome condition was caused by claimant's work for respondent, then the date of "occurrence" or date of "injury" relates back to the last date on which claimant worked.

K.S.A. 2007 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events,

[8] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 229, 885 P.2d 1261 (1994).

repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of

> permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

K.S.A. 44-5a05 states:

> A workman or his dependents shall not be entitled to compensation hereunder if it is proved that the disablement to the workman results from his deliberate intention to cause such disability, or from his willful failure to use a guard or protection against disablement required pursuant to any statute and provided for him, or a reasonable and proper guard and protection voluntarily furnished him by said employer, or solely from his intoxication.

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[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

The foregoing statutes are supplemented by K.A.R. 51-20-1 which provides:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

K.S.A. 44-511(b) states in part:

> The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
>
> . . . .
>
> If at the time of the accident the employee's money rate was fixed by the hour . . . (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

K.S.A. 44-511(a)(2) states in part:

> The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans.

ANALYSIS

The Board agrees with the result reached by the ALJ in the Award. The cause of claimant's condition was multifactorial. Although claimant's work environment with respondent contributed to the onset of his conditions, there were other non-work related factors. Nevertheless, the work conditions permanently aggravated claimant's condition

and were the primary cause of his resulting permanent impairment and disability. As such, the occupational disease statutes do not fit the facts of this claim. Claimant's condition is not "only a disease arising out of and in the course of the employment resulting from the nature of the employment"[12] because there were other causative factors. Likewise, it would be incorrect to find claimant's "occupational disease [was] aggravated by any disease or infirmity, not itself compensable,"[13] because the claimant's multifactorial conditions were aggravated by the work environment, not the other way around. Moreover, in *Burton*,[14] the Supreme Court considered K.S.A. 44-5a09(d) and found:

> This provision relates to the apportionment of a disability award under two different situations: (1) where a preexisting occupational disease is aggravated by any disease which is not compensable; and (2) where a disability which is not compensable is aggravated in some manner by an occupational disease. Both parties agree that only the second situation is possibly applicable to the facts of the present case, as Burton did not suffer from a preexisting occupational disease.

After discussing the distinction between an impairment versus a disability within the context of an occupational disease, the Supreme Court distinguished between apportioning disability and apportioning cause and held: "We construe K.S.A. 44-5a01(d) as not requiring apportionment where a disease producing a single disability is caused by both occupational and nonoccupational factors."[15]

Furthermore, it is difficult to say claimant's conditions constitute an occupational disease when they are both the result of a risk of employment and ordinary diseases of life. In *Casey*,[16] the Kansas Court of Appeals acknowledged that some compensable injuries are a hybrid containing elements of both a work-related accident and an occupational disease. And in *Garcia*,[17] the Court of Appeals approved an award of permanent partial disability compensation using K.S.A. 44-510e in the case of an occupational disease injury. This case is analogous to *Casey* in that although the employment presented an increased risk, it is difficult to characterize that risk as a "special risk" when the general public also is or may be exposed to the same conditions or diseases outside of the particular

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[12] K.S.A. 44-5a01(b).

[13] K.S.A. 44-5a01(d).

[14] *Burton v. Rockwell International*, 266 Kan. 1, 6, 967 P.2d 290 (1998).

[15] *Id.*, at 9.

[16] *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 114 P.3d 182, *rev. denied* 280 Kan. 981 (2005).

[17] *Garcia v. Tyson Fresh Meats, Inc.*, 34 Kan. App. 2d 843, 125 P.3d 580, *rev. denied* 281 Kan. 1377 (2006).

employment. In *Casey*, the Court of Appeals rejected the dissenters who would have treated claimant's condition as an occupational disease. As with injuries caused by repetitive traumas, claimant's conditions contain elements of both accidental injuries and occupational diseases. They are a hybrid that are neither fish nor fowl. But just as the court in *Berry* determined that repetitive use injuries should be compensated as injuries caused by accidents, so too should the claimant's conditions which were contributed to and made worse by his repetitive exposures to irritants at work. Although bronchitis has been treated as an occupational disease in some cases,[18] similar conditions resulting from repetitive exposures to airborne irritants have been treated as a series of accidents.[19]

This case is factually similar to *Burton* in that claimant was exposed to paint fumes and dust over an extended period of time at work, but it is also similar to *Casey* in that claimant's symptoms subsided when he left the workplace environment and his exposure to those irritants diminished.

The ALJ ultimately concluded that whether this case was fish or fowl, an accidental injury or an occupational disease, the remedy was the same. Citing *Garcia*, the ALJ determined that claimant's permanent partial disability compensation should be calculated pursuant to K.S.A. 44-510e. The Board agrees.

Garcia was a case where the claimant suffered permanent injury and impairment but no wage loss. Thus, if the only measure of disability for an occupational disease is loss of wage earning capacity, claimant had no disability. Under these circumstances, the court determined that treating the injury as an accident and using K.S.A. 44-510e to calculate claimant's disability was appropriate. The question of whether it is likewise appropriate to utilize K.S.A. 44-510e for an occupational disease when there is a loss of earning capacity was not answered in *Garcia*. However, such an approach finds support in K.S.A. 44-5a01(a), which states that the "disablement" of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident. K.S.A. 44-510e(a) provides a method for compensation for accidents and all cases "of temporary or permanent partial general disability not covered by [the] schedule [K.S.A. 44-510d] . . . ."

Here, claimant's injury is a hybrid of occupational disease and a series of accidents. The Board finds that claimant's exposure to paint fumes, dust from sanding, and other irritants at work caused repetitive traumas and injuries to claimant's airways, bronchial passages, and lungs and should be compensated as a series of accidents and injuries. The Board otherwise adopts the findings, conclusions and orders of the ALJ as its own.

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[18] See *e.g. Burton*, 266 Kan. 1, and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[19] See *e.g. Casey*, 34 Kan. App. 2d 66. See also *Baker v. USD 214*, No. 1,022,052, 2007 WL 2022148 (Kan. WCAB June 26, 2007); *Rains v. PMA*, No. 1,004,295, 2006 WL 2328062 (Kan. WCAB July 6, 2006); *Cook v. Sara Lee Bakery Group*, No. 1,008,181, 2006 WL 1933425 (Kan. WCAB June 29, 2006); *Casey v. Dillon Companies, Inc.*, No. 1,003,117, 2004 WL 2382718 (Kan. WCAB Sept. 21, 2004).

CONCLUSION

(1) Claimant suffered personal injury by a series of accidents (exposures) arising out of and in the course of his employment with respondent.

(2) Respondent failed to timely assert the defense of claimant's alleged willful failure to use a safety device and is barred from doing so on appeal.[20]

(3) Claimant's date of accident is November 8, 2004, when he was given restrictions and, as a result, his job was changed.

(4) The ALJ correctly calculated claimant's average weekly wage. Claimant's gross average weekly wage was $930.19 on November 8, 2004, and $982.94 on June 9, 2005.

(5) Claimant has a permanent impairment of function of 7.5 percent and a 96.75 percent work disability based upon a 100 percent wage loss and a 93.5 percent task loss for the period of May 14, 2005, until August 13, 2007.[21]

(6) As this is personal injury by accident and not an occupational disease, there is no apportionment. Furthermore, there has been no showing that claimant had any preexisting permanent impairment which is subject to offset.[22]

(7) The ALJ correctly calculated the amount of compensation due.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 30, 2008, is modified to find claimant suffered personal injury by accident but is otherwise affirmed.

IT IS SO ORDERED.

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[20] Furthermore, claimant's failure to use respirators was not willful as that term has been defined. In addition, the employer failed to rigidly enforce a rule or policy requiring the use of respirators. See K.A.R. 51-20-1; *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[21] There is a typographical error in the Award at page 7, where the ALJ used May 14, 2008, but intended to say 2005 as the beginning date for the work disability portion of the permanent partial disability compensation.

[22] See K.S.A. 44-501(c).

Dated this _____ day of December, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Jeff S. Bloskey and Kimberlee K. Conard, Attorneys for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge